

A constitutional twilight zone: EU decentralized agencies' external relations

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COMMON MARKET LAW REVIEW

CONTENTS Vol. 56 No. 6 December 2019

Editorial comments: *Brexit into extra time ... again* 1447-1458

Articles

M. Dougan, Primacy and the remedy of disapplication 1459-1508

M. Chamon, A constitutional twilight zone: EU decentralized agencies' external relations 1509-1548

N. Rennuy, The trilemma of EU social benefits law: Seeing the wood and the trees 1549-1590

M. Bronckers and G. Gruni, Taking the enforcement of labour standards in the EU's free trade agreements seriously 1591-1622

J. Waverijn and C. Nieuwenhout, Swimming in ECJ case law: The rocky journey to EU law applicability in the continental shelf and Exclusive Economic Zone 1623-1648

Case law

A. Court of Justice

The Court of Justice annuls a national measure directly to protect ECB independence: *Rimšēvičs*, A. Hinarejos 1649-1660

Private divorces outside Rome III and Brussels II bis? The *Sahyouni* gap, A. Dutta 1661-1672

Retrial and principles of effectiveness and equivalence in case of violation of the ECHR and of the Charter: *XC*, Zs. Varga 1673-1696

B. National Courts

Acte cryptique? *Zambrano*, welfare rights, and underclass citizenship in the tale of the missing preliminary reference, C. O'Brien 1697-1732

Review essay: A general theory of Member Statehood in the EU, J. Bengoetxea 1733-1752

Book reviews 1753-1788

Index I-XVIII

Aims

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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A CONSTITUTIONAL TWILIGHT ZONE: EU DECENTRALIZED AGENCIES' EXTERNAL RELATIONS

MERIJN CHAMON*

Abstract

Even though EU agencies are poorly embedded in the EU's constitutional framework their proliferation continues. If and when these agencies establish relations with international counterparts, they sometimes also conclude arrangements or agreement with those counterparts. This brings together two constitutionally problematic issues: the EU's external action and the limits to the empowerment of EU agencies. This article aims to identify the constitutional and positive law frameworks applying to EU agencies' external action, and looks at a number of examples. It is shown how the positive law framework does not properly reflect the requirements of EU constitutional law, resulting in legal ambiguity and accountability problems. Some EU agencies seem to go beyond what is allowed under the positive and constitutional law frameworks.

1. Introduction

EU decentralized agencies¹ occupy a peculiar position in the EU's institutional framework: they have become a vital part of the EU machinery yet the possibility to establish and empower them is as such not provided for under the Treaties.² While national systems may be confronted with a similar problem when independent authorities that are not foreseen under the national

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1. An official definition of EU decentralized agencies is lacking, also following the Common Approach on Decentralized Agencies. The EU Interinstitutional Style Guide lists the bodies considered to be “decentralized organizations (agencies)” but does still not reflect a genuine interinstitutional understanding; see section 9.5.3 of the Interinstitutional Style Guide. The working definition used here defines them as permanent bodies under EU public law, established by the institutions through secondary law and endowed with their own legal personality. See Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (OUP, 2016), p. 10.

2. See Mendes, “The EU Administration” in Kuijper et al., *The Law of the European Union and the European Communities* (Kluwer Law International, 2018), p. 309.

constitution are established,³ this issue acquires accrued legal significance for the EU, since the EU, unlike States, is constrained in its functioning by the principle of conferred powers. This principle is mainly known for its material dimension, i.e. prescribing that the EU can only legislate on matters for which competence has been conferred on it. However, the principle also has an institutional dimension. In organizational terms, it results in an institutional system that is more rigid than that of a State.⁴ Indeed, at least originally, the EEC's organizational structure was conceived as being "intended to be unalterable"⁵ since no specific competence had been conferred on the institutions to tinker with the institutional set-up. This links with the EEC (and EU) Treaties' character as *traités cadres*: when the Treaty authors restrict themselves to setting rather abstract objectives which need to be progressively realized by the EU institutions, the way in which the Treaty authors define the institutional architecture and decision-making becomes of constitutional significance.

However, in light of the institutional reality of agencification, this "originalist" view on the possibility to supplement the EU's institutional set-up and to confer powers on newly created entities has given way to a more pragmatic view.⁶ In this, the ECJ has played its part as well. In *ENISA* it accepted that EU bodies with their own legal personality could be established pursuant to Article 114 TFEU,⁷ despite it seeming difficult to qualify the establishment of an EU body as a "measure for the approximation of national laws".⁸ In *Short-selling* it formally relaxed the standard that applies when the

3. See Halberstam, "The promise of comparative administrative law: A constitutional perspective on independent agencies" in Rose-Ackerman and Lindseth (Eds.), *Comparative administrative law* (Edward Elgar, 2010), pp. 185–204.

4. Everling, "Zur Errichtung nachgeordneter Behörden der Kommission der Europäischen Wirtschaftsgemeinschaft" in Hallstein and Schlochauer (Eds.), *Zur Integration Europas* (Müller, 1965), p. 65.

5. Bertram, "Decision-making in the E.E.C.: The management committee procedure", 5 CML Rev. (1968), 255. Of course a genuine consensus on this was lacking. Around the same time as Bertram, Pescatore noted that current Art. 352 TFEU allowed the Council to "prendre même des dispositions de caractère organique, en vue de créer des organismes nouveaux dans le cadre de la structure institutionnelle". See Pescatore, *L'ordre juridique des Communautés européennes: Etude des sources du droit communautaire* (Presses Universitaires de Liège, 1975), p. 137.

6. For a more elaborate account of the legal change of heart, see Chamon, op. cit. *supra* note 1, pp. 192–207.

7. Case C-217/04, *UK v. Parliament & Council (ENISA)*, EU:C:2006:279.

8. The Court thus treated the institutional question as incidental to the question whether the tasks entrusted to ENISA were sufficiently linked to the harmonization measures which did approximate national law.

legislature confers powers on such bodies.⁹ While not as lenient as the intelligible principle that applies in US constitutional law,¹⁰ it still marked a watershed compared to the *Meroni* standard¹¹ that was hitherto held to apply to delegations to EU agencies.

Of course, this does not mean that the constitutional question of the position and function of EU decentralized agencies has been settled; it remains very much contested. From an EU law perspective, this contribution will focus specifically on one often overlooked area of the EU agencies' activities,¹² i.e. the external relations which these bodies have established with international and third country counterparts. The constitutional challenges which agencification poses are especially acute here,¹³ since in the area of external relations the "institutional balance" itself is already much contested between the EU institutions.¹⁴ Adding agencies to the equation adds a further dimension to this: to what extent can agencies develop any external action given that the typical agency mandate focuses on delivering policy output

9. Case C-270/12, *UK v. Parliament & Council (Short-selling)*, EU:C:2014:18. One could argue that the Court simply followed or sanctioned legislative practice as it had developed, but still then the Court relaxed the standard by bringing *Meroni* in line with this developed practice. On how the standard resulting from *Short-selling* is more lenient than the original *Meroni* doctrine, see Chamon, "Les agences de l'union européenne origines, état des lieux et défis", 51 CDE (2015), 308.

10. For a recent contribution on this principle in US constitutional law, see Edwards, "Who's exercising what power: Toward a judicially-manageable nondelegation doctrine", 68 *Administrative Law Review* (2016), 1–92.

11. Case 9/56, *Meroni v. High Authority*, EU:C:1958:7.

12. See however Groenleer and Gabbi, "Regulatory agencies of the European Union as international actors: Legal framework, development over time and strategic motives in the case of the European Food Safety Authority", 4 EJRR (2013), 479–492; Coman-Kund, *European Union Agencies as Global Actors* (Universitaire Pers Maastricht, 2015); Ott, Vos and Coman-Kund, "EU agencies and their international mandate: A new category of global actors?", *CLEER Working Papers* 7 (2013).

13. In this regard it may also be noted that the Commission's Vademecum on the EU's external action seems almost completely oblivious of the existence of EU agencies. Only when it comes to the EEAS representing the EU in (sub)committees at official level does the Vademecum provide that the EEAS will coordinate its preparations "with all relevant Commission services and any other relevant EU bodies (e.g. agencies, other institutions, etc.)". See SEC(2011)881, p. 23.

14. Just to illustrate, the post-Lisbon inter-institutional disputes in the area of external relations brought before the ECJ pursuant to Art. 263 TFEU are the following: Case C-130/10, *Parliament v. Council*, EU:C:2012:472; Case C-137/12, *Commission v. Council*, EU:C:2013:675; Case C-377/12, *Commission v. Council*, EU:C:2014:1903; Case C-658/11, *Parliament v. Council*, EU:C:2014:2025; Case C-114/12, *Commission v. Council*, EU:C:2014:2151; Joined Cases C-103 & 165/12, *Parliament and Commission v. Council*, EU:C:2014:2400; Case C-28/12, *Commission v. Council*, EU:C:2015:282; Case C-425/13, *Commission v. Council*, EU:C:2015:483; Case C-73/14, *Council v. Commission*, EU:C:2015:663; Case C-263/14, *Parliament v. Council*, EU:C:2016:435; Case C-660/13, *Commission v. Council*, EU:C:2016:616; Case C-389/15, *Commission v. Council*,

within the EU? Is there scope at all for agency external action in light of the policy prerogative of the Council (pursuant to Art. 16 TFEU) and the external representation prerogative of Commission (pursuant to Art. 17 TFEU), prerogatives which are reflected and concretized in Article 218 TFEU? What kind of external action can agencies develop, taking into account the delegation limits that generally apply to them and which (*a fortiori*) should also apply to their external dealings? Finally to what extent does the actual external action developed by the EU agencies respect the framework that may be deduced from the constitutional rules governing both the EU's external relations generally and agencification specifically?

The analysis in the following sections will show that the positive law framework governing EU agencies' external relations (identified in section 4) is fragmented, excessively differentiated, and incomplete. It is fragmented because it is spread over binding and non-binding documents that have not all been published. It is excessively differentiated because the precise requirements vary from one agency to the next without good reasons for this heterogeneity.¹⁵ It is also incomplete since it does not fully reflect the requirements that can be deduced from the relevant constitutional principles (identified in section 3). Section 5 will show that the resulting ambiguity as to the concrete rules governing agency external action is legally and politically unsatisfactory, since it facilitates agency slippage,¹⁶ creating problems of accountability and legitimacy, and has resulted in (or at least contributed to) some EU agencies having concluded potentially problematic agreements with third country counterparts or international organizations.

2. EU agencies and the external dimension

In the external relations of EU agencies, a distinction should be made between two different activities. Thus, EU agencies may themselves be forums for international cooperation when third countries or international organizations participate in their activities (inward external relations). A different constellation is if EU agencies establish relations with third countries or

EU:C:2017:798; Case C-687/15, *Commission v. Council*, EU:C:2017:803; Case C-244/17, *Commission v. Council*, EU:C:2018:662; Joined Cases C-626/15 & C-659/16, *Commission v. Council*, EU:C:2018:925.

15. Of course, some differentiation is necessary and justifiable, see *infra* note 116.

16. Kassim and Menon, "The principal-agent approach and the study of the European Union: Promise unfulfilled?", 10 *Journal of European Public Policy* (2003), 122.

international organizations (outward external relations). This contribution will focus only on the latter.¹⁷

As far as the rationale for the EU agencies' external relations goes, there are no EU agencies which have external cooperation as their core mandate. Instead, EU agencies are established to secure the proper implementation of the EU *acquis* internally. This means that EU agencies will only pursue external activities insofar as this is necessary to realize their internal EU objectives. Whether EU agencies are engaged externally thus depends on whether this is useful or necessary to realize their internal mandate.¹⁸ To illustrate: an agency like Frontex could in theory fulfil its mission of supporting the Member States in securing the EU's external borders without developing any external relations. Clearly, though, it will do a much better job in doing so if it establishes, and subsequently formalizes, cooperative relations with the EU's neighbours through administrative agreements or arrangements. Conversely, the European Agency for Safety and Health at Work has been established to provide EU actors with scientific and technical information in the field of safety and health at work in order to improve the working environment. To realize its mission, it does not seem that useful to conclude arrangements or agreements with third countries, although it does evidently entertain contacts with organizations such as the International Labour Organization.

This possibility of EU agencies entering into administrative agreements or arrangements¹⁹ raises the question of the nature of such texts. At least from the perspective of international law, the species of administrative agreements does not exist.²⁰ Instead these are proper treaties in the sense of Article 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT) or,²¹ depending on the

17. For a discussion of the European Economic Area Member States' participation in EU agencies, see Bekkedal, "Third State participation in EU agencies: Exploring the EEA precedent", 56 CML Rev. (2019), 381–416. Another form of inward external relations are the EU Member States with opt-outs that have (partially) opted in in some of the EU agencies, but these will not be further discussed either.

18. As Mendes notes "[i]nternational regulatory cooperation between agencies may constitute a necessary condition for the effective performance of their tasks". See Mendes, op. cit. *supra* note 2, p. 312.

19. As Bartelt and Ott note, following the entry into force of the Lisbon Treaty, a trend (in the Commission's practice) may be witnessed whereby a distinction is made between binding agreements and non-binding arrangements. See Bartelt and Ott, "Die Verwaltungszusammenarbeit der Europäischen Kommission mit Drittstaaten und internationalen Organisationen: Kategorisierung und rechtliche Einordnung", 51 *Europarecht* (2016), *Beiheft*, 157. This terminological distinction will also be used in this contribution.

20. Opinion of A.G. Tesauro in Case C-327/91, *France v. Commission (I)*, EU:C:1993:941, para 22.

21. Morrison, "Executive agreements" in *Max Planck Encyclopedia of Public International Law* (2007), para 2.

absence of an intention to be bound,²² non-binding arrangements. On whether such administrative agreements may indeed be binding, the positions in the academic debate seem to oscillate between accepting the binding character of administrative agreements (insofar as this is clear from the text of the agreement)²³ and a certain denial of the relevance of the question, by noting that administrative cooperation is typically not formalized in legal commitments so as not to ossify the cooperation and because, in any event, the interests of the different administrations typically run parallel.²⁴ The distinguishing feature of these agreements, i.e. what makes them “administrative”, is purely internal since they are concluded pursuant to a simplified procedure under domestic law (i.e. without parliamentary approval) and/or by State departments without passing through the ordinary diplomatic channels (typically the ministry of foreign affairs).²⁵ From an EU perspective then, any agreement that has not been negotiated and concluded pursuant to Articles 218 or 219 TFEU is an administrative agreement. The very pragmatic approach which international law takes to the issue is also apparent in Article 7 of the 1969 VCLT which provides that agencies can also bind their States despite lacking full powers if “[i]t appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.” A virtually identical provision features in the 1986 VCLT. In terms of international responsibility, which of course is a separate question, it follows from the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO) that States and international organizations are responsible for the acts (even if *ultra vires*) of

22. Fitzmaurice, “Treaties” in *Max Planck Encyclopedia of Public International Law* (2010), para 17.

23. Vierdag, “De praktijk van de zogenoemde ‘Internationale Administratieve Akkoorden’” in Recht (Ed.), *Spanningen tussen Recht en Praktijk in het Verdragenrecht* (Libresso, 1989), p. 48; Benchendikh, “Le régime juridique des arrangements administratifs”, 7 *Droit Administratif* (2005), para 11.

24. Virally, “La distinction entre textes internationaux de portée juridique et textes internationaux dépourvus de portée juridique”, 60 *Annuaire de l’Institut de droit international* (1983), 290.

25. Vierdag, op. cit. *supra* note 23, p. 42. On administrative agreements concluded by EU Member States, see Ott, “The EU Commission’s administrative agreements: ‘Delegated treaty-making’ in between delegated and implementing rule-making” in Tauschinsky and Weiß (Eds.), *The Legislative Choice Between Delegated and Implementing Acts in EU Law: Walking a Labyrinth* (Edward Elgar, 2018), p. 211. On executive agreements in the US, see Bodansky and Spiro, “Executive agreements+”, 49 *Vanderbilt Journal of Transnational Law* (2016), 885–930.

their agencies acting in an official capacity.²⁶ International law thus refers back to the mandate of the agencies as defined in EU law, requiring us to look into the internal EU rules on the agencies' external relations.

In the following sections this contribution will identify the framework governing the EU agencies' outward external relations in both deductive and inductive fashion. First, concrete rules will be deduced from the relevant general constitutional principles. Subsequently the positive law framework will be construed from institutional practice as it results from relevant inter-institutional agreements (IIA) and secondary law adopted by the EU institutions.

3. The constitutional framework governing the EU agencies' external relations

The general constitutional principles that are of specific relevance will be shown to be the principle of institutional balance and the non-delegation doctrine resulting from *Short-selling*. It will be argued that all other relevant principles can be largely subsumed under these two general principles. However, before unpacking these two principles, it is necessary to clarify their mutual relationship, given that the two are often conflated when they are applied to the EU agencies (see also below). While the nature and function of the institutional balance is still being debated,²⁷ it is assumed here to be a genuine principle of EU law, the function of which is to protect the systemic integrity of the EU.²⁸ While no single institutional balance exists,²⁹ the institutional balance in a specific area of EU law assigns competences to specific institutions in order to concretely realize the objectives of the EU in that area, given the *traité cadre* nature of the EU Treaties.³⁰ As a result, it may

26. See Art. 4 ARSIWA and Arts. 6 & 8 ARIO. According to the commentary on the draft articles, "[t]his wording is intended to convey the need for a close link between the ultra vires conduct and the organ's or agent's functions". See *Yearbook of the International Law Commission* (2011), Vol. II, part 2, p. 60.

27. For an overview of this debate see Johnson, "The institutional balance as an agent of transformation in the EU constitutional order: Reconciling the simultaneous rise of the European Parliament and European agencies", 6 *Cambridge International Law Journal* (2017), 206–207; Chamon, op. cit. *supra* note 1, pp. 268–287; Bartelt and Ott, op. cit. *supra* note 19.

28. See Le Bot, *Le principe de l'équilibre institutionnel en droit de l'union européenne* (Université Panthéon-Assas, 2012), PhD Thesis, p. 243.

29. See Chamon, "Institutional balance and Community method in the implementation of EU legislation following the Lisbon Treaty", 53 *CML Rev.* (2016), 1503–1504.

30. On the link between the EU Treaties' quality as *traités cadres* and the principle of institutional balance, see Koutrakos, "Institutional balance and sincere cooperation in treaty-making under EU law", 68 *ICLQ* (2019), 6.

be argued that the institutional balance does not merely turn on the prerogatives of the institutions concerned, but also on their duty to further the EU's objectives. In contrast, the non-delegation doctrine of the *Short-selling* ruling goes back to the *Meroni* doctrine, which is concerned with the question of ensuring continued political and judicial control over the exercise of (delegated) public authority by subsidiary bodies.³¹ What are the precise requirements flowing from these principles for the agencies' external relations?

3.1. *Institutional balance*

Post-Lisbon, Article 13(2) TEU "reflects the principle of institutional balance, characteristic of the institutional structure of the European Union."³² As noted by Hillion, Article 13(2) TEU actually brings together different structural principles that govern both the demarcation and exercise of powers.³³ There is the strict idea of conferral,³⁴ i.e. an institution cannot exercise a power without a competence;³⁵ the specific idea of institutional balance, i.e. in exercising its powers an institution must not negatively affect the prerogatives of another institution;³⁶ and the idea of sincere cooperation, i.e. a duty to ensure that the (other) institutions and the decision-making procedures as prescribed by the Treaties can continue to fulfil their Treaty ordained functions.³⁷ While the principle of institutional balance as worded in Article 13(2) TEU suggests that it only applies between the EU institutions, it is clear that its scope of application should be all-encompassing to ensure that it may fulfil its systemic

31. See Chamon, "Beyond delegated and implementing acts: Where do EU agencies fit in the Article 290 and 291 scheme?" in Weiß and Tauschinsky (Eds.), *The Legislative Choice between Delegated and Implementing Acts in EU Law* (Edward Elgar, 2018), p. 184.

32. Case C-409/13, *Council v. Commission*, EU:C:2015:217, para 64.

33. Hillion, "Conferral, cooperation and balance in the institutional framework of EU external action" in Cremona (Ed.), *Structural Principles in EU External Relations Law* (Hart, 2018), p. 126.

34. Koutrakos as well notes that "the principle of institutional balance encapsulates ... the institutional implications of the principle of conferral". See Koutrakos, op. cit. *supra* note 30, 4.

35. Competence in absence of power being ineffective and power in absence of competence being illegal, see Constantinesco, *Compétences et pouvoirs dans les Communautés européennes: contribution à l'étude de la nature juridique des communautés* (LGDR, 1974), pp. 82–83.

36. Hillion, op. cit. *supra* note 33, p. 145.

37. Ibid., pp. 151–152. In this regard, Koutrakos notes that institutional balance (in the strict sense) and the principle of sincere cooperation "amount to an indissoluble whole" under Art. 13(2) TEU. See Koutrakos, op. cit. *supra* note 30, 6.

protection function. Not only would it therefore apply to other EU bodies such as agencies,³⁸ but also to the Member States.

The principle of institutional balance thus not only restricts the EU institutions when they establish and empower EU agencies (i.e. the process of agencification itself) but it also restricts the EU agencies in what they can do when exercising the powers conferred on them. In terms of conferral, the principle requires that the external action of EU agencies is foreseen (whether explicitly or implicitly) in the agency's mandate as defined in the agency's establishing act. Since, for the present purposes, the principle of conferred powers can thereby be largely subsumed under the principle of institutional balance, it need not be treated as a separate limit.³⁹ The other two limbs of institutional balance subsequently apply to the agencies in the exercise of their powers in which they have to respect both a negative and a positive obligation: one ensuring that they do not encroach on or negatively affect the powers of the institutions proper and another, pursuant to the sincere cooperation limb, ensuring that they facilitate the institutions in pursuing their Treaty ordained tasks.

Applied to the area of EU external relations, where no *lex specialis* applies for the EU agencies as it does for the ECB,⁴⁰ this means that EU agencies may not affect the prerogative of the Council to determine the (external) policy of the Union and to authorize the opening of negotiations and the signature and conclusion of agreements on behalf of the EU (cf. Art. 218(2) TFEU). In the *France v. Commission* cases⁴¹ *ITLOS*⁴² and *Swiss Memorandum*⁴³ the ECJ

38. Hillion, op. cit. *supra* note 33, p. 173. While the three agencies active in the CFSP provide a specific case that will not be further addressed here, it should be noted that the principle of institutional balance also applies to them although the specific institutional balance in the area of CFSP (former 2nd Pillar) is of course completely different from the institutional balance in the area of external relations under the former 1st Pillar.

39. This is in fact only different for those bodies forming part of the EU's "second organizational layer" whose mandate is (partially) foreseen in the Treaties themselves, thereby taking it outside the reach of the EU institutions. According to Hilf, a distinction may indeed be made between the primary, secondary and tertiary organizational layers of the EU, i.e. the bodies created by the Treaties, the bodies foreseen but not created by the Treaties, and the bodies not created nor foreseen by the Treaties. See Hilf, *Die Organisationsstruktur der Europäischen Gemeinschaften* (Springer Verlag, 1982), p. 4. As noted above, most EU decentralized agencies form part of the EU's tertiary organizational layer, only Europol, Eurojust, the European Defence Agency and the European Public Prosecutor being foreseen in the Treaties.

40. While Art. 218 TFEU gives specific expression to the general institutional balance in EU external relations, Art. 219 TFEU provides for specific rules (and a specific role for the ECB) in relation to agreements in the area of monetary cooperation.

41. Case C-327/91, *France v. Commission (I)*; Case C-233/02, *France v. Commission (II)*, EU:C:2004:173.

42. Case C-73/14, *Council v. Commission (ITLOS)*, EU:C:2015:663.

43. Case C-660/13, *Council v. Commission (Swiss Memorandum)*, EU:C:2016:616.

protected this prerogative from encroachment by the Commission, but evidently this applies *a fortiori* to the EU agencies as well. Here Bartelt and Ott note that the Council can still delegate the power⁴⁴ to conclude administrative agreements to the Commission in secondary law or in an international agreement itself.⁴⁵ This may be applied *mutatis mutandis* to the EU agencies, albeit that such a delegation should also conform to the non-delegation doctrine (see further below) and should in addition be scrutinized in light of the prerogatives of the Commission and Parliament: by conferring powers on the agencies, the Council cannot undermine the powers which the Commission and Parliament would otherwise hold.

In terms of the Commission's prerogatives, cases like *ITLOS* and *Australia emissions trading system* demonstrate that the Commission has a prerogative and duty to represent the EU to the outside world,⁴⁶ which also includes a prerogative to recommend opening negotiations and to negotiate on behalf of the EU (cf. Art. 218(3) TFEU). Specifically, when the Commission negotiates on behalf of the EU, the proper fulfilment of its tasks evidently requires the agencies to abstain from giving binding instructions;⁴⁷ or, less far-fetched since it has already happened in the past, it precludes agencies from taking the Commission's seat in the EU delegation. The positive obligation resulting from the sincere cooperation limb of institutional balance in addition requires the agencies to assist the Commission when the latter represents the EU in international fora (e.g. providing the Commission with expertise as part of the EU delegation).

Finally, in light of the Court's post-Lisbon case law on the role of the Parliament in external relations, agencies also have to take into account the Parliament's prerogatives when engaging in external relations. These include the prerogative to be fully informed and the prerogative to give or withhold consent to certain agreements concluded on behalf of the EU (cf. Art. 218(6)(a) and 218(10) TFEU). Indeed in the *Tanzania* case the Court noted that the:

44. The idea is that an authority's *competences* are inalienable and that only the *power* to exercise a competence can be delegated. See Gautier, *La délégation en droit communautaire* (Strasbourg 3, 1995), PhD Thesis, p. 47.

45. Bartelt and Ott, op. cit. *supra* note 19, 152–157. In relation to the Commission, Bartelt and Ott also cite Art. 220 TFEU, but obviously this legal basis cannot be invoked by the EU agencies.

46. Tellingly, the ECJ ruled that while Art. 335 TFEU only explicitly envisages the Commission representing the EU before national jurisdictions, this was merely an “expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission”. See Case C-73/14, *ITLOS*, para 58.

47. As follows from Case C-425/13, *Commission v. Council (Australia emissions trading system)*, EU:C:2015:483, para 88.

“participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly. As regards the procedure for negotiating and concluding international agreements, the information requirement laid down in Article 218(10) TFEU is the expression of that democratic principle, on which the European Union is founded”.⁴⁸

Thus, the specific requirement to fully inform the Parliament at all stages of the procedure when international agreements are negotiated and concluded on behalf of the Union is not self-standing, but merely gives expression to a more fundamental principle.⁴⁹ In institutional balance terms, informed by the democratic principle, it can thus be argued that the Parliament has a prerogative and duty to ensure democratic oversight. In terms of external relations, Article 218(10) TFEU does not exhaustively settle the scope of this oversight but merely makes it explicit in relation to the most significant type of external action of the Union. Applied to the EU agencies, it could mean that the Parliament also has a prerogative and duty to exercise democratic oversight, requiring the agencies to keep the Parliament fully and immediately informed of the (administrative) agreements or arrangements which they are negotiating and concluding on behalf of the EU or in their own name.

In a nutshell, institutional balance requires the EU agencies to practice sincere cooperation with the EU institutions and equally requires an explicit or implied conferral of the power to engage in external action in secondary law. If such a power is conferred on the agency, any agreements or arrangements are concluded on behalf of the EU agency itself. The Council may also delegate its power to act on behalf of the EU,⁵⁰ in which case special attention is required to ensure that the prerogatives of the Commission and Parliament are safeguarded,⁵¹ otherwise the Council would be circumventing the institutional balance transpiring from Article 218 TFEU.

48. Case C-263/14, *Parliament v. Council (Tanzania)*, EU:C:2016:435, para 70.

49. The required involvement of the Parliament is even an essential procedural requirement, violation of which results in the automatic invalidity of the measure in question. See Case C-658/11, *Parliament v. Council*, EU:C:2014:2025, para 86.

50. It follows from Case C-233/02, *France v. Commission II* that it is immaterial here (for institutional balance purposes) whether the agency's action is binding or non-binding.

51. This is not to say that institutional balance concerns are only triggered when the agency acts on behalf of the EU (rather than in its own name), instead institutional balance concerns then become especially relevant.

3.2. *Non-delegation*

The second major principle is the non-delegation doctrine enshrined in the *Meroni* doctrine as re-interpreted in 2014 by the ECJ in the *Short-selling* case. This principle is specific to EU agencies and must be assumed to apply to them generally, regardless of whether they act internally or externally. Following *Short-selling*, the *Meroni* doctrine requires the powers of EU agencies to be “precisely delineated” instead of merely executive (as under the original doctrine). Before looking into how the Court understands the notion of “precisely delineated powers”, the question of the precise relationship between the institutional balance and the *Meroni* doctrine should briefly be returned to here. Since in the literature the *Meroni* doctrine is often conflated with institutional balance, where the former is understood as a specific expression of the latter, one could question whether the *Meroni* doctrine really is a self-standing requirement. As noted above, equating both seems incorrect. This may be illustrated with the following hypothetical example: under Article 218(5) TFEU the Council is to authorize the signing of international agreements negotiated by the Commission or the High Representative. The question whether or not an agreement should be signed on behalf of the EU is of course a highly political decision given the consequences of the act of signing under international law.⁵² Arguably, however, once this political decision is taken, the actual act of signing is purely executive and does not imply the exercise of discretionary powers. Could the Council in this light authorize an EU agency to sign the agreement on behalf of the EU? That agency would act fully in line with the *Meroni* doctrine, exercising a precisely delineated power. It seems clear, however, that such a Council decision would still violate the institutional balance since it transpires from Title III TEU and Article 218 TFEU that it is a prerogative of the High Representative or the Commission to be authorized to sign agreements negotiated by them.

What then does it mean for powers to be “precisely delineated”? Arguably, the following three requirements can be generalized from *Short-selling*: a power may be said to be “precisely delineated” under that case law when (i) the conferral of powers is exceptional, e.g. entrusting a task to an agency may be justified in light of the technical nature of the task; (ii) the agency’s powers are embedded in decision-making procedures involving other actors, i.e. the agency should not be able to make decisions completely autonomously; and (iii) the agency acts pursuant to pre-defined criteria.⁵³

52. See Art. 18 of the Vienna Convention on the Law of Treaties.

53. See Chamón, “Granting powers to EU decentralized agencies, three years following *Short-selling*”, 18 *ERA Forum* (2018), 600. Coman-Kund draws a different set of criteria from *Short-selling*. They are not taken over because they integrate institutional balance concerns in

Specifically for the EU agencies' external relations this would require the EU legislature, as a matter of *ex ante* control, to clearly set out for which reasons and under which conditions agencies can conclude agreements or arrangements with international counterparts. In the original *Meroni* doctrine, one further requirement was that a delegation may not be *presumed*, but has to be made explicit.⁵⁴ In *Short-selling*, the Court did not need to recall this requirement, but it should arguably still apply, meaning that significant external action such as the conclusion of agreements or arrangements should be explicitly foreseen in an agency's establishing act. The ongoing (political) control prescribed by the second requirement must be complemented by (*ex post*) judicial control exercised by the ECJ, but it should be clear that the Court set a rather low threshold: applied to the EU agencies concluding arrangements or agreements it would not require any of the political institutions to exercise a veto power, a power of opinion being sufficient.

Finally, the first requirement that may be deduced from *Short-selling* can also be seen to reflect a proportionality requirement. The general proportionality principle that governs the content and form of all EU action can thus be largely subsumed under the specific necessity requirement of the re-interpreted *Meroni* doctrine. A principle which normally figures between conferral and proportionality, but which is not taken over here as a separate limit either, is subsidiarity. Not because it is irrelevant,⁵⁵ but because subsidiarity should already be addressed by the legislature when defining the core mandate of the EU agency. If the core mandate is in line with subsidiarity, and if the external activity of an agency is a (necessary) function of that core mandate which respects the principle of proportionality, subsidiarity issues should not arise.

3.3. Combining and enforcing the two principles

Any power conferred on or delegated to EU decentralized agencies therefore needs to meet the *Meroni* requirements regardless of any additional institutional balance concerns. As regards the latter, it is clear that in granting

the *Meroni* doctrine and because they still refer to the merely executive nature of agencies' powers. See Coman-Kund, op. cit. *supra* note 12, p. 89.

54. Case 9/56, *Meroni*, p. 151.

55. On the relevance of subsidiarity in the EU's external relations, see Bosse-Platière, "L'application du principe de subsidiarité dans le cadre de l'action extérieure de l'Union européenne" in Neframi and Gatti (Eds.), *Constitutional Issues of EU External Relations Law* (Nomos, 2018), pp. 111–136; De Baere, "Subsidiarity as a structural principle governing the use of EU external competences" in Cremona, op. cit. *supra* note 33, pp. 93–115.

powers to EU agencies, an EU institution cannot encroach on the prerogatives of another institution and neither can it divest itself of its prerogatives. A complicating factor here, of course, is that the institutional balance may be rather elusive, i.e. “it is not the sharp sword which would delineate with clarity and in advance the limits of institutional powers.”⁵⁶ The precise institutional balance in any given area of EU law does not clearly transpire from the Treaties, and instead it will be up to the Court to engage in a law-finding exercise to define the institutional balance in an ad hoc manner. *Short-selling* is a case in point whereby the ECJ effectively sanctioned the possibility for the EU legislature to confer implementing powers in the sense of Article 291 TFEU on EU decentralized agencies.⁵⁷ This was despite the fact that a natural reading of Article 291 TFEU suggests that the implementation of EU law (at least at EU level) is a prerogative of the Commission and the Council. While the question of institutional balance was thereby neglected by the Court in *Short-selling*, this shortcoming may be addressed, at least partially, by incorporating institutional balance concerns in the first limb of the “precisely delineated test” (cf. above): by ensuring that EU agencies are only exceptionally empowered, the impact on the institutions’ prerogatives may be limited or minimalized.

Under the constitutional framework, then, agencies could conclude both agreements and arrangements with third country counterparts or international organizations, as long as such a precisely delineated power is provided for in their mandate, which the non-delegation doctrine would require to be done in an explicit manner. Agencies should further exercise such power while respecting the prerogatives of, and practising sincere cooperation with, the institutions proper. That power will furthermore only be precisely delineated when it is necessary for the agency to perform its main tasks and when it is subject to political and judicial control,⁵⁸ which implies that the agency acts

56. Koutrakos, op. cit. *supra* note 30, 6.

57. In *Short-selling*, the Court sidestepped this issue by postulating that the power conferred on ESMA “does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU” (Case Case C-270/12, *Short-selling*). However, it is difficult to qualify the ESMA’s power under Art. 28 of Regulation 236/2012 as anything other than a *de facto* implementing power under Art. 291 TFEU. See *inter alia* Bertrand, “La compétence des agences pour prendre des actes normatifs; le dualisme des pouvoirs d’exécution”, (2015) RTDE, 28; Chamon, “Beyond delegated and implementing acts: Where do EU agencies fit in the Article 290 and 291 scheme?” in Weiß and Tauschinsky, *The Legislative Choice between Delegated and Implementing Acts in EU Law* (Edward Elgar, 2018), p. 186.

58. In light of the ECJ’s existing external relations case law it may be assumed that even if an arrangement (i.e. a non-binding act) is at issue, the Court would still accept jurisdiction under Art. 263 TFEU, as the act itself of exercising a presumed power results in legal effects, since it creates, for the EU’s counterparts, an impression as to the EU division of competences.

pursuant to predefined criteria and not in complete autonomy. The necessity test could then further mean that agencies may only conclude arrangements but no agreements, since agencies would never be required to legally commit themselves (or the EU) in order to be able to fulfil their mandate.

If these are constitutional principles governing the EU agencies' external action, how may they be enforced against the agencies and possibly the EU institutions when empowering the agencies? Since this is typically done through formal legislative acts, only the privileged applicants will be able to directly challenge the empowerments themselves.⁵⁹ In addition, non-privileged applicants will typically not be able to challenge the agreements or arrangements concluded by the EU agencies either. The non-binding arrangements will not produce any legal effects *vis-à-vis* natural or legal persons, whereas any binding agreements might constitute regulatory acts but will typically require implementing measures or will not concern private parties individually and directly. If private parties would wish to challenge the legality of these agreements, they will have to do so indirectly by challenging either national implementing measures (upon which preliminary questions may be referred to the ECJ) or EU implementing measures (upon which an exception of illegality may be raised). On the contrary, the privileged applicants will be able to directly challenge even non-binding arrangements if they claim a violation of the institutional balance,⁶⁰ given that "the Court has in the past [in applications brought by privileged applicants] addressed comparable substantive issues even where there were strong indications of inadmissibility".⁶¹ Contrary to actions brought by private parties,⁶² the ECJ would probably be inclined to allow a case against an arrangement adopted by an EU agency if it is brought by an EU institution or Member State claiming that the agency overstepped its mandate or unlawfully arrogated powers to itself.

See e.g. Opinion of A.G. Kokott in Joined Cases C-626/15 & C-659/16, *Commission v. Council (AMP Antarctique)*, EU:C:2018:362, para 66.

59. This since the legislative acts in question will typically not directly and individually concern any private party.

60. See to this effect Case C-233/02, *France v. Commission II*, para 40; Case C-660/13, *Swiss Memorandum*, para 36; Joined Cases C-8 & 10/15 P, *Ledra Advertising et al. v. Commission & ECB*, EU:C:2016:701, para 59.

61. Opinion of A.G. Sharpston in Case C-73/14, *ITLOS*, EU:C:2015:490, para 49.

62. In a case brought by private parties, the Court noted that all "act[s] of a[n] [EU] institution, ... carry an incidental implication that the institution in question has adopted a position as to its competence to adopt them, that adoption of a position cannot itself be viewed as a binding legal effect for the purposes of Article [263 TFEU]". See Case C-131/03 P, *Reynolds Tobacco et al. v. Commission*, EU:C:2006:541, para 66.

4. The positive law framework governing the agencies' external relations

In how far is the framework identified above reflected in positive law? In order to answer this question, the establishing regulations of the agencies need to be read together with the 2012 Common Approach on Decentralized Agencies (a non-binding interinstitutional agreement)⁶³ as well as the working arrangements that have been concluded between the agencies and the Commission.⁶⁴

4.1. *Prima facie* lack of international legal personality of EU agencies

The very first question which arises is whether EU agencies enjoy international legal personality (separate from that of the EU). Depending on whether they do, a distinction would have to be made between instances when agencies act under the EU umbrella while concluding administrative agreements or arrangements, and when they act as separate subjects of international law. The EU agencies' establishing acts typically contain a provision on their legal personality which reads: "The [agency] shall have legal personality. It shall enjoy in all the Member States the most extensive legal capacity accorded to legal persons under their laws." In the regulations of the agencies of the third wave,⁶⁵ the nature of this legal personality is further specified with the following provision: "It [the agency] may, in particular, acquire or dispose of movable and immovable property and may be party to legal proceedings." While these provisions may at first sight be read as conferring only legal personality under national law and EU law, without immediate implications for their status in the international legal order,⁶⁶ it cannot *a priori* be excluded that they also confer legal personality under international law.⁶⁷ After all, a similar provision may be found in Article 308 TFEU in relation to the European Investment Bank the "partial capacity to

63. See <europa.eu/european-union/sites/europaeu/files/docs/body/joint_statement_and_common_approach_2012_en.pdf>.

64. These working arrangements, foreseen by the Common Approach, are not made public. Access was secured through "access to documents" requests pursuant to Regulation 1049/2001.

65. I.e. the agencies established from 2001 onwards.

66. Ruffert, "Personality under EU Law: A conceptual answer towards the pluralisation of the EU", 20 ELJ (2014), 358.

67. Note in this regard that the ECJ in *ITLOS* also interpreted Art. 335 TFEU and its provision that "[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their law; it may ... be a party to legal proceedings. To this end, the Union shall be represented by the Commission" as indicative of the Commission's competence to represent the Union before international tribunals. See Case C-73/14, *ITLOS*, para 58.

enter into international relations [of] which is recognized by practice".⁶⁸ Nonetheless, this would only be the case if it can be shown that such international legal personality is necessary for the agency to fulfil its mandate and, subsequently, whether such personality is recognized by States or whether it has effective power to partake in the creation of international law.⁶⁹

What light does the practice of EU agencies' external relations shed on this question? The only agreements resembling proper international agreements which the EU agencies have concluded are their headquarters agreements with their respective host States.⁷⁰ In line with the Common Approach these are also the international agreements foreseen in the agencies' establishing regulations.⁷¹ Schusterschitz concludes from the headquarters agreements that have been concluded that a large number of EU host States recognize the international legal personality of the EU agency which they host.⁷² However, Ott cautioned against taking this as proof of the international legal personality of EU agencies, arguing that cumulative indications are required.⁷³ A cautious approach indeed seems in order, given the lack of any further treaty practice and lack of clear recognition by non-EU States.⁷⁴ Furthermore, the finalized agreement for the orderly withdrawal of the UK from the EU⁷⁵ undermines the argument that an international legal personality for EU agencies may be inferred from their practice of concluding headquarters agreements. Article 119 of the draft withdrawal agreement deals with the headquarters agreements concluded by the UK and provides that the relevant agencies will be relocated to the remaining Member States. As regards the termination of the agreements, the article provides: "The date of notification by the Union of the completion date of the relocation shall constitute the termination date of those host agreements." The fact that the EU might give notification of the

68. Ruffert, *op. cit. supra* note 66, 359.

69. Depending on whether one follows the "recognition conception" or the "actor conception" of international legal personality, see Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010), pp. 80–84 & 213.

70. See Chamon, *op. cit. supra* note 1 pp. 93–97.

71. According to the Commission, "29 of the 33 existing decentralised agencies have concluded headquarters agreements with their host Member States." See Commission, COM(2019) 187 final.

72. Schusterschitz, "European agencies as subjects of international law", 1 *International Organizations Law Review* (2004), 175.

73. Ott, "EU regulatory agencies in EU external relations: Trapped in a legal minefield between European and international law", 13 *EFA Rev.* (2008), 515–540.

74. See in contrast, the host agreement to which Seatzu and Pintus superfluously refer to show how the international personality of the Organization Internationale de la Francophonie has been recognized in practice. See Seatzu and Pintus, "L'organisation internationale de la francophonie comme sujet du droit international public", 93 *Rev. dr. Int. dr. comp.* (2016), 41–42.

75. See O.J. 2019, C 661/1.

termination instead of the agency itself suggests that headquarters agreements are concluded by the agency on behalf of the EU, not on its own behalf.

Other than to headquarters agreements, the establishing regulations of around half of the EU agencies refer to further types of instruments to formalize the international relations of EU agencies, if such relations are at all foreseen in the first place. The “administrative arrangements” or “working arrangements” (the exact name differs from one agency to the next) suggest that these acts are never intended to be binding. When a number of these arrangements are analysed, this will be further verified (see below, section 5). After all, if EU agencies’ capacity to conclude treaties is treated as that of international organizations, their constituent instruments need not confer international legal personality in an explicit manner,⁷⁶ but it may also transpire from their practice. First, however, the relevant provisions of both the Common Approach and a selection of recently adopted or recast establishing regulations will be assessed.

4.2. *The common approach on decentralized agencies*

To remedy the ad hoc approach to agencification, the EU institutions in 2012 adopted a set of guiding principles – a “Common Approach” – to make the EU decentralized agencies’ governance and functioning more coherent, effective, efficient and accountable.⁷⁷ The Common Approach found its origins in the 2001 White Paper on Governance which suggested that the criteria for relying on EU agencies and a framework for their functioning should be defined.⁷⁸ The Commission’s proposal for a binding IIA establishing such a framework failed to muster support in the Council.⁷⁹ Formally, the Council argued that it did not want to pre-empt future decisions of the legislature and its legal service argued that there was no proper legal basis to establish such a framework.⁸⁰ In reality however, the Commission’s proposal was too supranational, and the Council preferred the flexibility to follow an *ad hoc* approach.⁸¹ The fact that

76. Webb, “Treaties and international organizations: Uneasy analogies” in Tams, Tzanakopoulos and Zimmerman (Eds.), *Research Handbook on the Law of Treaties* (Edward Elgar, 2014), p. 570.

77. European Commission, “Breakthrough as EU institutions agree common approach on agencies”, 13 June 2012, Press Release IP-12-604.

78. European Commission, “European Governance: A White Paper”, COM(2001)428 final.

79. For the proposal see European Commission, “Draft interinstitutional agreement on the operating framework for the European regulatory agencies”, COM(2005)59 final.

80. Council of the European Union, “CLS Opinion on the Draft Interinstitutional Agreement on the operating framework for the European regulatory agencies”, Doc. 7861/05.

81. See Comte, “Agences européennes: relance d’une réflexion interinstitutionnelle européenne?”, (2008) *Revue du Droit de l’Union Européenne*, 487–488.

the question of the legal basis does not seem to have been reconsidered in light of the entry into force of the Lisbon Treaty is telling in this regard.⁸² The Commission withdrew its proposal in 2008 and an interinstitutional working group was instead established. The working group performed a horizontal review of the agencies' establishing acts and set out to define the non-binding Common Approach (hereafter: CA) which was ultimately adopted in 2012.⁸³

At the time, the CA was received rather critically.⁸⁴ This was because it was formally non-binding but especially because the document was disappointing as to its substance. On most issues, the CA was a simple codification of existing "best practices", though it did not even taken into account the most recent developments. Furthermore, certain vital issues are completely ignored in the CA. For one, the CA on Decentralized Agencies fails to define what an EU Decentralized Agency is. This means that the instrument meant to rationalize EU agencification results in preliminary discussions between the EU institutions on whether the CA should at all apply to a certain body the establishment of which is under consideration.⁸⁵ Secondly, the most hotly debated issue in legal doctrine, the limits of agencies' powers and the *Meroni* doctrine, was ignored in the CA and left for the ECJ to tackle in *Short-selling*.

In contrast to this general reception of the CA, it must be noted that the section devoted to the EU agencies' external relations does contain novel and elaborate requirements. It thus explicitly provides that agencies cooperating at the international level should establish a strategy for their external relations in their work programme.⁸⁶ Moreover, the CA provides that working arrangements with the relevant Commission Directorates General (DGs)

82. The Council Legal Service's objection to Art. 352 TFEU as a legal basis should have been reconsidered given that post-Lisbon Art. 352 TFEU provides for the consent of the European Parliament. Similarly, the implications of the revamped Art. 295 TFEU should arguably have been considered.

83. Comte, "Agences décentralisées: vers un statut unifié? Approche commune du Parlement européen, du Conseil de l'Union européenne et de la Commission européenne sur les agences décentralisées" in Govaere and Hanf (Eds.), *Scrutinizing Internal and External Dimensions of European Law – Les dimensions internes et externes du droit européen à l'épreuve* (Peter Lang, 2013), Vol. I, pp. 146–147.

84. See *inter alia* Scholten, "The newly released 'common approach' on EU agencies: Going forward or standing still?", (2012) CJEL online, <www.cjel.net/online/19_2-scholten>; Bernard, "Accord sur les agences européennes: la montagne accouche d'une souris", (2012) *Revue du Droit de l'Union Européenne*.

85. See e.g. the disagreement between the Commission and a number of Member States on the nature of the body proposed by the Commission in COM(2018)630 final.

86. See para 25 of the Common Approach, see link *supra* note 63. The agencies' work programmes are adopted by the Boards of the agencies and sent to the EU institutions for information. Sometimes the Commission is formally involved in the adoption of the work programme, see Chamon, *op. cit. supra* note 1, pp. 82–83.

should ensure that agencies stay within their mandate.⁸⁷ Most importantly, the CA clarifies that agencies should not be seen as representing the EU or committing the EU internationally.⁸⁸ Finally, the CA aims to ensure the consistency of the EU's external policy by prescribing an early exchange of information between the agency, the Commission and the Union delegations.⁸⁹

In light of the constitutional framework identified above, it therefore seems clear that the non-binding CA gives expression to a concern for the principle of institutional balance (second limb). By providing that EU agencies can never act on behalf of the EU any institutional balance concerns are pre-empted, since the prerogatives of the EU institutions as enshrined in Article 218 TFEU are safeguarded. If an agency only acts on its own behalf, it cannot thwart the prerogatives of the EU institutions. The early exchange of information and the working arrangements reflect a duty of sincere cooperation but only in relation to the Commission, not the other institutions. Finally, the idea that agencies should stay within their mandate clearly reflects the conferral limb of the principle of institutional balance. What is therefore lacking in the CA are requirements reflecting the non-delegation doctrine (which is unsurprising since, as mentioned above, the general issue of delegation was also completely ignored in the CA) and a clear role for the European Parliament. In addition, as will be further argued below, it is quite problematic that a key issue such as ensuring that agencies stay within their mandate, an issue that is further linked with the non-delegation doctrine, is left to be regulated by the Commission in working arrangements that are not pro-actively made public and that no enforcement means are provided to the Commission to ensure agencies respect their mandates.⁹⁰

4.3. *Provisions in the establishing regulations*

Horizontally screening the different regulations establishing EU decentralized agencies reveals that most recognize an international dimension to the work of

87. See para 25 of the Common Approach.

88. Ibid.

89. Ibid.

90. The early warning mechanism (see *infra* note 144) means that the Commission has to rely on its power of persuasion *vis-à-vis* EU agencies. This is not ideal but may of course still work, e.g. when the Commission threatened to use the mechanism to object to a draft memorandum of understanding between the Single Resolution Board and its US counterpart (cf. *infra* note 93) on which its legal service had advised negatively, see Note of the Legal Service of 6 July 2017 addressed to the Deputy Director-General of the Directorate-General for Financial Stability, Financial Services and Capital markets Union (DG FISMA), "Memorandum of Understanding (MoU) between the SRB and the Federal Deposit Insurance Corporation (FDIC)", Ares(2017)3405320.

EU agencies, but of those that do, few contain provisions on instruments through which the agencies' external relations may be formalized.⁹¹ Crucially, none provide a clear mandate to conclude agreements or arrangements on behalf of the EU. While this possibility is allowed for under the constitutional framework (see above), it has not been relied on by the legislature and instead has been excluded by the institutions in the Common Approach.

The fact that few regulations prescribe the means through which EU agencies can pursue external action already suggests that for most agencies the legislature did not foresee any significant external action. For example, Article 2(4)(h) of the EMSA regulation provides that one of the tasks of the agency is to provide the:

“technical assistance necessary for the Member States and the Commission to contribute to the relevant work of the technical bodies of the IMO, the International Labour Organization as far as shipping is concerned, and the Paris Memorandum of Understanding on Port State Control and relevant regional organizations to which the Union has acceded, with regard to matters of Union competence.”⁹²

While the EMSA could give such assistance in absence of this explicit clause, it is clear that explicating this task of the EMSA is preferable. In institutional balance terms as defined above, the agency's role as envisaged in its regulation is (solely?) restricted to assisting the Commission in the fulfilment of its Treaty-ordained task to represent the EU's interests on the international plane. The fact that other agencies' establishing regulations also contain provisions on how those agencies can pursue their own external relations may,⁹³ *a contrario*, suggest that the EMSA is prohibited from doing so. However, such an inference would be premised on the idea that the EU legislature has been informed by a coherent and consistent view of the agencies' role and place in the EU institutional set-up. Unfortunately that has not been the case, even following the Common Approach, as agencification has largely developed in an *ad hoc* fashion.

Where the establishing regulations do contain provisions on how they may pursue their external relations, a number of developments can be noted in

91. See the overview in Coman-Kund, *op. cit. supra* note 12, pp. 439–440.

92. See Regulation 1406/2002, O.J. 2002, L 208/1. Similarly, see Art. 23(j) of the EFSA Regulation (178/2002) which is even more protective of the Commission's prerogatives, since it provides that any assistance by the EFSA has to be requested by the Commission.

93. One interesting example is the Single Resolution Board for which the establishing regulation explicitly provides that it may conclude memoranda of understanding with third country counterparts and that it may do so on behalf of the national resolution authorities of the EU Member States participating in the Single Resolution Mechanism, see Art. 32 of Regulation 806/2014, O.J. 2014, L 225/1.

recent years. Generally, the legislature is devoting greater attention to the issue by introducing detailed requirements and omitting unhelpful vague limits. In this regard, a clear concern on the part of the legislature may be noted in that it explicitly aims to safeguard the EU's and the Member States' competence to act externally. Secondly, the legislature seems increasingly intent on explicating the link between the core mandate of the agencies and their external action. Finally, the role of the EU institutions in controlling the agencies in their external action also seems in flux.

For instance, the EASO, EASA and Frontex regulations provided that the arrangements concluded by these agencies with third countries should be "in accordance with the relevant provisions of the Treaty" – without however identifying these Treaty provisions.⁹⁴ Following the revisions of the establishing regulations, this enigmatic clause⁹⁵ is being replaced with more concrete and useful requirements.⁹⁶

In terms of clauses that aim to protect the competences of the Member States, the 2010 regulations establishing the financial authorities (ESAs) introduced specific provisions which were later taken over in the ERA regulation and (partially) in the regulations of the social agencies, the EASA and the ACER. Since 2010, the following provisions have cropped up: the agency may enter into arrangements "without prejudice to the respective competences of the Member States and the Union institutions (including the European External Action Service)";⁹⁷ "[t]hose arrangements shall not create legal obligations in respect of the Union and its Member States";⁹⁸ such

94. See Art. 14 of the original Frontex Regulation (2007/2004); Art. 18(2) of the original EASA regulation (1592/2002); Art. 49(2) of the original EASO regulation (439/2010).

95. According to Coman-Kund the "relevant provisions of the Treaty" are the material basis on which the agency has been established and Art. 218 TFEU. See Coman-Kund, *op. cit. supra* note 12, p. 202.

96. This clause no longer figures in the recast Frontex and EASA regulations. Pursuant to the Commission proposal to update the EASO regulation (COM(2016)271) the clause would also be taken out of the EASO regulation.

97. See Arts. 33 of the ESAs regulations (1093/2010; 1094/2010; 1095/2010); Art. 19 of the wholesale energy market regulation (1227/2011); Art. 44(1) of the new ERA regulation (2016/796); Art. 30(1) of the new EU-OSHA regulation (2019/126); Art. 30(1) of the new Eurofound regulation (2019/127); Art. 29(1) of the new Cedefop regulation (2019/128). Only the regulations for the ACER and ERA also refer to the EEAS' competences.

98. See Arts. 33 of the ESAs regulations (1093/2010; 1094/2010; 1095/2010); Art. 19 of the wholesale energy market regulation (1227/2011); Art. 34(5) of the CEPOL Regulation (2015/2219); Art. 23(3) of the Europol regulation (2016/794); Art. 44(2) of the new ERA regulation (2016/796); Art. 99(3) of the EPPO Regulation (2017/1939); Art. 90(2) of the new EASA regulation (2018/1139); Art. 47(3) of the Eurojust regulation (2018/1727) Art. 30(1) of the new EU-OSHA regulation (2019/126); Art. 30(1) of the new Eurofound regulation (2019/127); Art. 29(1) of the new Cedefop regulation (2019/128); Art. 39(1) of the 2017 ENISA proposal. In the Commission's proposal for the wholesale energy market regulation (COM(2010)726 final) this provision was not foreseen.

arrangements “shall not prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with international organizations and the administrations of third countries”.⁹⁹ These provisions give expression to the concern that is also central to the Common Approach, namely: ensuring that whatever EU agencies do, they cannot be seen to bind the EU or the Member States and do not take over the external relations' functions of the institutions proper. In addition, the third provision precludes the possibility of an *ERTA* effect flowing from the administrative arrangements concluded by EU agencies. This clarification has acquired special relevance following the Court's decision in *Green Network* in which it ruled that EU secondary law may also pre-empt administrative authorities of the Member States from concluding agreements with third country counterparts.¹⁰⁰

In terms of the principle of conferral and the non-delegation doctrine, increased attention on the part of the legislature to link any external action by the agency with its internal mandate may also be noted. A new standard provision here seems to be that an agency will develop such external action only “in so far as necessary to achieve the objectives of” its establishing regulation.¹⁰¹ In the case of Frontex, Europol and Eurojust the threshold is arguably put higher because it requires the agencies' external activities to be necessary for “the fulfilment of [their] tasks.”¹⁰² Similarly to the new Frontex regulation, the new ERA regulation even prescribes the finality of the working arrangements which the agencies may conclude.¹⁰³ Arguably then, if the agency cannot show that its working arrangements further the objectives as prescribed by its establishing regulation, it is acting *ultra vires*.

Finally there are the provisions on the control exercised by the EU institutions. These provisions again illustrate how the questions of

99. See Arts. 33 of the ESAs regulations (1093/2010; 1094/2010; 1095/2010); Art. 19 of the wholesale energy market regulation (1227/2011); Art. 44(2) of the new ERA regulation (2016/796).

100. See Case C-66/13, *Green Network*, EU:C:2014:2399.

101. Art. 19 of the wholesale energy market regulation (1227/2011); Art. 44(1) of the new ERA regulation (2016/796); Art. 30(1) of the new EU-OSHA regulation (2019/126); Art. 30(1) of the new Eurofound regulation (2019/127); Art. 29(1) of the new Cedefop regulation (2019/128). Art. 39(1) of the 2017 ENISA proposal. However, the new EASA regulation lacks this provision.

102. See Art. 54(1) of (the 2016) Frontex regulation 2016/1624 (Arts. 72 in conjunction with 74 of the 2019 Frontex Regulation); Art. 23(1) of the Europol regulation; Art. 47(1) of the Eurojust regulation.

103. In the case of the ERA this is “in order to keep up with scientific and technical developments and to ensure promotion of the Union railways legislation and standards”; in the case of Frontex, this is “to promote European border management and return standards”. See Art. 54(1) of the 2016 Frontex regulation (Art. 72 of the 2019 Frontex Regulation) and Art. 44(1) of the new ERA regulation.

institutional balance and non-delegation cannot be equated with each other. After all, by prescribing that agencies cannot act on behalf of the EU or bind the EU, and by instructing agencies to assist the EU institutions, the prerogatives of the EU institutions under the institutional balance appear adequately safeguarded. Yet, the fact that the EU agencies must be subject to a sufficient measure of control, even if they act on their own behalf, explains why further provisions setting out the *ex ante* and ongoing control by the EU institutions of external agency action are also necessary. Here too, legislative practice seems in flux where political control is mainly channelled through the Commission¹⁰⁴ although the precise degree of control does not seem aligned to the political sensitivity of the external action in question.

The recently adopted (revised) establishing acts of a number of EU agencies are illustrative in this regard. Under the old CEPOL and EASA establishing acts, these agencies could conclude working arrangements with third country counterparts but only following the Council's (CEPOL) or Commission's (EASA) approval. Under the recast establishing acts, this has been changed into a (mere) Commission opinion on the draft arrangements.¹⁰⁵ Especially for the EASA, this is remarkable, since the Commission had proposed to retain the existing requirement.¹⁰⁶ For Eurojust, the Commission is not involved in the conclusion of individual working arrangements, but the latter must be foreseen in Eurojust's "four year cooperation strategy" which is drawn up in consultation with the Commission.¹⁰⁷ The recently established European Public Prosecutor may conclude working arrangements with third countries without any involvement of the Commission whatsoever.¹⁰⁸ In contrast, for Frontex, the requirement of a Commission opinion on its working arrangements in its old establishing regulation has been upgraded to prior

104. Note however that in the 2016 Europol regulation, no concrete involvement of the Commission in the conclusion of working arrangements is foreseen.

105. See Art. 34(5) of the CEPOL regulation; Art. 90(2) of the new EASA regulation; see also Art. 44(2) of the new ERA regulation. It should be noted that in the case of CEPOL the Council also retains control because CEPOL can only conclude arrangements with countries with which the EU itself has concluded a cooperation agreement.

106. Remarkably, this requirement was removed at the suggestion of the European Parliament, see the four column trilogue document NEGO_CT(2015)0277(2017-09-26) at p. 384. In light of this, it will be interesting to see what happens to the Commission's proposal for the new EASO and ENISA regulations in which it also proposed a requirement of Commission approval. See Art. 35(2) of the EASO proposal (COM(2016)271 final); Art. 39(3) of the ENISA proposal (COM(2017)477 final). While asylum issues are also politically sensitive, the envisaged cooperation would be limited to promote the EU's standards and to promote capacity building which might not warrant the (heavy) requirement of Commission approval. See Art. 35(2) in COM(2016)271 final.

107. See Art. 52(1) of the Eurojust regulation.

108. See Art. 99(3) in conjunction with Art. 104(1) of the EPPO regulation.

Commission approval in the new regulation.¹⁰⁹ In light of the political sensitivity of the respective areas concerned (air safety and police training versus cooperation between border guards) this greater degree of control indeed seems appropriate. However, in 2019 the establishing acts of the three agencies active in the area of social policy were also recast. While these agencies have only very modest mandates, *a fortiori* resulting in limited external action that will not be politically salient, the Commission's approval of their working arrangements with third country counterparts is prescribed.¹¹⁰

Finally, the Frontex regulation and the proposal for a recast EASO regulation foresee a role for the Parliament in that it needs to be kept fully informed of the working arrangements concluded by the agencies.¹¹¹ In the trilogues on the new Frontex regulation, Parliament even succeeded in ensuring that working arrangements concluded with third countries (but not those with international organizations) must be sent to the Parliament *before* their conclusion.¹¹² Whether this parliamentary control requirement, similar to that in Article 218(10) TFEU, should be generalized to all agencies, rather than some of those operating in the AFSJ, depends on whether one envisages a genuinely parliamentary system for the EU. In any event, it seems something of an anomaly that a similar requirement is not foreseen for agencies like Europol, Eurojust and the EPPO.

4.4. *The individual working arrangements between the partner Commission DGs and their agencies*

As noted above, the Common Approach requires the agencies to conclude working arrangements with their partner DGs¹¹³ at the Commission. This requirement seems to reflect a concern for both *ex ante* control and a means to safeguard the institutional balance. This is confirmed in the Commission's 2016 proposal for a recast ACER regulation, in which it foresees that "[t]he Commission shall ensure that the Agency operates within its mandate and the existing institutional framework by concluding an appropriate working

109. See Arts. 52(2) and 54(2) of the 2016 Frontex regulation.

110. See Art. 30(1) of the new EU-OSHA regulation (2019/126); Art. 30(1) of the new Eurofound regulation (2019/127); Art. 29(1) of the new Cedefop regulation (2019/128).

111. See Arts. 52(2) and 54(2) of the 2016 Frontex regulation; Art. 35(2) of the Commission's EASO proposal COM(2016)271 final.

112. See the four column document of 20 June 2016 (NEGO_CT(2015)0310), p. 218.

113. On the more than semantic difference between the notions of "parent DG" and "partner DG", see Trondal, "The rise of independent supranational administration: The case of the European Union administration" in Trondal (Ed.), *The Rise of Common Political Order – Institutions, Public Administration and Transnational Space* (Edward Elgar, 2017), p. 83.

arrangement with the Agency's Director.”¹¹⁴ Depending on the content of the WAs, it also helps ensure good cooperation between the agency and the partner DG, putting into effect the duty of cooperation under the institutional balance. In light of this, it is remarkable that some seven years after the adoption of the Common Approach, because of recalcitrance on the part of some EU decentralized agencies, a number of partner DGs have not yet managed to conclude WAs with their agencies. While the Court does not require the institutions proper to conclude inter-institutional agreements (in light of the principle of loyal cooperation),¹¹⁵ this could be different for EU agencies, since these are subordinate bodies. It could indeed be argued that agencies are required, under the duty of loyal cooperation limb of the principle of institutional balance, to conclude such WAs with their partner DGs.

While the responsibility rests on the DGs to conclude the WAs, the Commission Secretariat General has provided some support to the DGs. As a result, while a truly consistent approach between DGs is lacking, some common elements may still be noted. These are the following:

- agencies have no international legal personality;
- agencies lack implied powers to commit the EU;
- agencies' external activities should be in line with their mandate and the EU institutional framework;
- agencies' external relations should be in line with the EU's priorities and be in line with EU legislation and policies;
- agencies can never officially represent the EU to the outside world;
- agency officials may participate in EU delegations but only if the head of the delegation (Commission or High Representative) finds this useful;
- agencies must consult the Commission before engaging in any external action.

Provisions that may commonly be found, although not in a majority of working arrangements are:

- a requirement to copy the partner DG in all formal correspondence with third countries' authorities;
- a requirement that the agencies' external action should have added value and that the external action should be proportionate to the agency's core task;
- the possibility (or obligation) of the partner DG to provide guidance to the agency on how to interpret its mandate.

114. See Art. 43(3) of the Commission's proposal, COM(2016)863 final. Similarly, see Art. 39(3) of the 2017 ENISA proposal.

115. See Case C-25/94, *Commission v. Council*, EU:C:1996:114.

Finally, on some issues, different working arrangements prescribe different, sometimes opposite, requirements. For instance, as regards the participation in EU delegations, a right of the CPVO to sit in UPOV technical meetings and a possibility even to represent the EU in such meetings is recognized in its WA. The EMCDDA, CEPOL and EFCA WAs however only acknowledge that those agencies' staff members may be technical members of the EU delegation, but rule out that they be formal members thereof. The EMA, CPVO and ECHA WAs also provide that the head of the delegation may allow the agency to take the floor on behalf of the EU. The WAs of the ESAs even recognize that the Commission and the ESAs may participate in international fora independently from each other.

As regards liaising with the EEAS, the EASO may do so directly under its WA, while the EMCDDA must first go to its partner DG before liaising with the EEAS. Other agencies such as the EIGE, CEPOL, Eurofound, EU-OSHA, Cedefop, EFCA, ECHA and ENISA are barred from doing so entirely, as all communication with the EEAS must go through the partner DG.

4.5. *A positive law framework that is fragmented and which insufficiently reflects relevant constitutional principles*

If the non-binding Common Approach and the working arrangements (together with the establishing acts) can be qualified as composing the positive law framework governing the EU agencies' external action, it is clear that all relevant constitutional requirements identified in section 3 can be retraced therein at least in some way. It is equally clear, however, that the legislature and the Commission have not been sufficiently consistent in translating general constitutional principles into concrete rules framing EU agencies' external action: the resulting framework is fragmented and composed of binding and non-binding texts. In addition, it is differentiated, since the precise requirements vary from one agency to the next. While some differentiation between agencies is useful, a common denominator of elements also seems necessary.¹¹⁶ Similar to other agency governance

116. In this regard, bad differentiation e.g. relates to whether EU agencies have international legal personality, the requirement that agency external action should be coherent to the external policy of the EU; information requirements *vis-à-vis* the EEAS and European Parliament, etc.; issues where differentiation is useful are e.g. the instruments with (and degree to) which agencies can act externally, the precise working relations with the Commission DGs and EEAS, the intensity of control exercised by political actors (as a function of the degree to which agencies are externally active and e.g. in function of the sensitivity of the area in which the agency acts), etc.

issues,¹¹⁷ a convergence in the provisions typically found in the establishing acts may be noted following the adoption of the Common Approach, but given that the latter is non-binding and incomplete, unjustifiable discrepancies between the different agencies remain (see above).¹¹⁸

If this diagnosis is relatively straightforward, the remedy is far from that. As with most agency governance issues,¹¹⁹ addressing the question of what the framework governing the agencies' external relations should look like requires the institutions and Member States to address a more fundamental question, namely: what is the role and place of EU decentralized agencies in the EU's institutional set-up? Should EU agencies be genuinely independent or rather subordinate executive bodies? What is their precise relationship with or position *vis-à-vis* the Commission, Parliament, Council and Member States? In a spirit of constructive ambiguity, these questions have remained unsolved in agencification, since addressing them would have resulted in a decisional stalemate. Given, though, that all relevant actors involved agree that there is a concrete policy need for greater expertise to support policy development and greater coherence in implementation, the discussion on the more abstract institutional questions is "kicked down the road".

Today, there is no political appetite and therefore no realistic prospect that a common understanding on the above questions might be reached. Indeed, even with regard to the revision of the non-binding Common Approach, only the Parliament has shown some interest.¹²⁰ Still, such a revision would be the most realistic intermediate step before a common understanding on the agencies' role and place in the EU's institutional set-up may be reached.¹²¹ Pursuant to such a revision, the institutions could further flesh out the existing provisions in greater detail. In addition, the common denominator of the

117. See Chamon, "Transparency and accountability of EU decentralized agencies and agencification in light of the Common Approach on EU decentralized agencies" in Garben, Govaere and Nimitz (Eds.), *Critical Reflections on Constitutional Democracy in the European Union* (Hart, 2019), pp. 245–266.

118. The most pressing of these discrepancies would seem that the possibility for external action is not recognized for all EU agencies, that the role of the EU institutions proper (as defined in the establishing regulations) varies greatly, and that something as crucial as the international legal personality is not only regulated in mere non-binding working arrangements, but that not all agencies have even concluded such working arrangements with their partner DGs. As section 5 shows, agencies such as EMSA and EASA (but also Frontex), which are very active externally, are among those that have not concluded such working arrangements.

119. See Chamon, *op. cit. supra* note 117.

120. See e.g. point 7 of the Resolution of the European Parliament of 14 Feb. 2019 on the implementation of the legal provisions and the Joint Statement ensuring parliamentary scrutiny over decentralized agencies.

121. Less realistic alternatives to an inter-institutional agreement are an amendment of the Treaties or a legislative act adopted pursuant to Art. 352 TFEU.

working arrangements could also be incorporated in the Common Approach. Indeed, it should be stressed again here that it is remarkable that a crucial issue such as the international legal personality of EU agencies is left to be regulated in obscure working arrangements. Similarly, the requirement to be found in most WAs prescribing that agencies should respect the EU's priorities and should act in line with the EU's policies and legislation should be codified in a recast Common Approach, since that requirement is equally in line with Article 21(3) TEU which prescribes that "[t]he Union shall ensure consistency between the different areas of its external action and between these and its other policies". Modest progress can therefore still be made in simplifying, strengthening and rationalizing the positive law framework governing EU agencies' external relations. This would benefit coherence and transparency even without requiring the political institutions and the Member States to address the thorny question of the precise position, role and function of EU agencies, a question which the Common Approach explicitly raised but did not answer.

As in the case of the constitutional framework above, a final question here is whether and how the positive law framework identified in the present section can be enforced against the EU agencies. Just like for the constitutional framework, this will be a matter for the privileged applicants, where the Court may be expected to be lenient on the admissibility of such actions even when non-binding arrangements are challenged. Whether non-binding documents such as the Common Approach and the working arrangements could be invoked to show the illegality of an agreement or arrangement concluded by an agency is a different matter. While agencies could be said to have bound themselves by agreeing to a working arrangement with their partner DG,¹²² a similar construction could not be relied upon for requirements flowing from the Common Approach. Instead the relevant provisions of the establishing acts or working arrangements could be read in light of the Common Approach, making the latter enforceable. Again, all this will be different for private parties, given the strict standing requirements applicable to them. In addition, a further hurdle for private parties (assuming that the admissibility hurdle is passed) would be that it is doubtful whether they could even invoke a violation of a procedural provision (such as the one prescribing the Commission's consent or opinion).¹²³

122. By analogy, see *inter alia* Case C-167/04 P, *JCB Service v. Commission*, EU:C:2006:594, paras. 207–209.

123. In *Tilly-Sabco* A.G. Wahl suggested that private applicants could not invoke such procedural provisions unless the rule amounts to an essential procedural requirement intended to guarantee legal certainty. The ECJ did not address the issue of whether private parties can invoke such rules of procedure, but simply examined the alleged infringement of its own

5. Administrative agreements or arrangements concluded by the EU agencies

Finally, it is useful to look into some of the actual arrangements which EU decentralized agencies have concluded with international counterparts to see whether they conform to both the constitutional law framework and the positive law framework identified above. It is also relevant to ascertain whether there is any empirical proof of the agencies' capacity to act internationally, which may be implied in their establishing acts (see above) but could also be deduced from their practice and especially from the recognition of their international personality by States.¹²⁴ The four arrangements that are looked into are: the Service Level Agreement concluded by the European Maritime Safety Agency (EMSA) with its Norwegian counterpart; the working arrangement concluded by EASA with its Ukrainian counterpart; the Cooperation Agreement between EMSA and Eurocontrol; and the Memorandum of Cooperation between EFSA and its Japanese counterpart.¹²⁵ These four arrangements will be scrutinized to determine (i) whether the constitutional and positive law frameworks identified above have been respected and (ii) whether the agencies' practice indicates a recognition of their international legal personality.

5.1. *EMSA's SLA with the Norwegian Coastal Administration*

In 2016, the EMSA concluded a Service Level Agreement (SLA) with the Norwegian Coastal Administration in relation to the hosting, maintenance and operation of IT servers for the SafeSeaNet project. The EMSA's competence to conclude such SLAs implicitly flows from Directive 2002/59, which tasks the EMSA with the technical implementation of SafeSeaNet. EMSA has several such SLAs (with other EU agencies and with national authorities of the Member States) but the remarkable issue here, of course, is that the agreement in question is concluded with a third country authority. In terms of legal basis, a problematic issue is that the EMSA regulation itself only

motion. See Opinion of A.G. Wahl in Case C-183/16 P, *Tilly Sabco v. Commission*, EU:C:2017:348, para 56; Case C-183/16 P, *Tilly Sabco v. Commission*, EU:C:2017:704, para 116. In *Common Market Fertilizers*, the Court ruled that such rules cannot be involved by private parties in so far they (merely) ensure the internal working of committees (or in this case agencies). See Case C-443/05 P, *CMF SA v. Commission*, EU:C:2007:511, para 144.

124. Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007), p. 398.

125. These documents represent a variety of constellations, involving both third countries and international organizations as counterparts, agencies with and without dedicated working arrangements with their partner DG, binding and non-binding documents, etc.

provides for the conclusion of arrangements by EMSA, not agreements.¹²⁶ At the same time, no prerogatives of the EU institutions seem affected and the very technical nature of the agreement would pass *Short-selling*'s test that the agency has to act on predefined criteria (which annex III of Directive 2002/59 provides). In addition, under EMSA's regulation the Executive Director has to submit arrangements to the Board, on which the Commission has representatives, which can object within four weeks.¹²⁷ If this procedure is respected, this might also satisfy the *Short-selling* requirement that the agency cannot act completely autonomously. Yet, unlike EMSA's agreement with Eurocontrol (see further below) this procedure is not referred to in the SLA. Indeed, this specific SLA was not submitted to the Board,¹²⁸ while two other similar SLAs were presented to the Board pursuant to Article 15(2)(ba) of the EMSA Regulation.¹²⁹ The first concerned an agreement for the hosting, maintenance and operation of the North Atlantic AIS Regional Server and its connection with SafeSeaNet, again with EMSA's Norwegian counterpart while the other was concluded with the Maritime Analysis and Operations Centre – Narcotics, a body established through an international agreement concluded between 7 EU Member States but partially funded by the EU.¹³⁰ EMSA's practice, therefore, is incoherent and dubious under its own Regulation.

In addition, it could be questioned whether EMSA necessarily needs to conclude agreements with third country authorities to host SafeSeaNet. Since EMSA is one of those agencies which has not concluded a WA with its partner DG, the SLA cannot be reviewed in light of this. Of course, that a WA is still forthcoming some 7 years after the adoption of the Common Approach itself raises the question whether the EMSA has not breached the duty of loyal cooperation *vis-à-vis* the Commission, as discussed above.

On the binding nature of the agreement itself, there can be no doubt. The agreement refers to "the Parties", employs "shall" throughout, lists specific obligations and contains clauses on entry into force, termination and dispute settlement, etc. Overall, however, it resembles more of a commercial contract since the Norwegian authority agrees to provide a service in return for financial remuneration. In this regard, it is especially remarkable that both parties agreed that their agreement is governed by "European Union Law" (whatever that may mean in practice) and that the ECJ has exclusive

126. See Art. 15(2)(ba) of the EMSA Regulation.

127. Ibid.

128. As confirmed following a request for access to documents, on file with the author.

129. See written procedures 05/2014 and 06/2014, on file with the author.

130. For the text of this agreement, in Dutch and English, see <zoek.officielebekendmakingen.nl/trb-2007-231.html>.

jurisdiction in case of a dispute. Despite the odd constellation, then, it must be assumed that the EMSA has merely concluded a private contract.¹³¹

5.2. *EASA's SAFA WA with the Ukrainian Aviation Administration*

The EASA is perhaps one of the most active EU agencies when it comes to concluding working arrangements with international counterparts. The type of arrangements which it concludes are also diverse.¹³² As a result, the present discussion of the 2015 SAFA WA concluded with its Ukrainian counterpart is merely an illustration and should not necessarily be seen as a representative example of the whole of WAs which the EASA concludes. The acronym SAFA stands for Safety Assessment of Foreign Aircrafts, a programme which the EASA inherited from the European Civil Aviation Conference. Today it forms part of the EU Ramp Inspection Programme, allowing ramp inspections of foreign aircraft. The operational management of the programme has been left by the Commission to the EASA. Because the programme includes non-EU Member States “the pan-European dimension of the programme, has been assured through the signature of a Working Arrangement between ... these individual States and EASA.”¹³³

In terms of legal basis, the operational management of the original SAFA programme was entrusted to the EASA by the Commission in its Regulation 768/2006,¹³⁴ implementing Directive 2004/36.¹³⁵ The current Ramp Inspection Programme is foreseen in Commission Regulation 965/2012. Both instruments provide that the EASA:

“shall manage and operate the tools and procedures necessary for the collection and exchange of ... the information provided by third countries or international organizations with whom appropriate agreements have been concluded with the EU, or organizations with whom the Agency has

131. See in this vein Reuter, *Introduction au droit des traités* (Presses Universitaires de France, 1985), p. 37.

132. For a discussion, see Coman-Kund, *op. cit. supra* note 12, pp. 210–243.

133. See Report from the Commission on the European Community SAFA Programme, O.J. 2008, C 231/1. As noted by Coman-Kund, the second generation of SAFA WAs (from 2011 onwards) have been concluded also with non-European counterparts. See Coman-Kund, *op. cit. supra* note 12, p. 213.

134. See O.J. 2006, L 134/16.

135. See O.J. 2004, L 143/76. Given the Commission's broad discretion when adopting measures implementing formal legislation, the decision to “outsource” the management of SAFA to the EASA does not seem problematic. For the relevant standard as elaborated by the Court to assess the Commission's implementing power under Art. 291 TFEU, see Case C-65/13, *Parliament v. Commission*, EU:C:2014:2289, paras. 44–45.

concluded appropriate arrangements in accordance with [Article 90(2) of the EASA Regulation]".¹³⁶

In terms of conferral, therefore, this legal basis is problematic since for the integration of third countries in the programme a proper agreement under Article 218 TFEU seems required, WAs only being foreseen for international organizations.¹³⁷ On the other hand, in terms of institutional balance, the WA seems unproblematic as it does not *prima facie* infringe on either the Commission's or the Council's prerogatives and neither does it frustrate these institutions in exercising their prerogatives. Like the guidelines of the Commission at issue in *France v. Commission II* they were not adopted in a vacuum and the Commission was kept informed and even had to consent to them.¹³⁸ As a result, the *Short-selling* requirements are thereby also met, since the EASA is effectively tasked to manage certain technicalities of the programme according to criteria pre-defined in the Commission's regulations.

However, despite its qualification as a WA, the arrangement concluded with the Ukrainian authority actually appears from its wording to be an agreement,¹³⁹ since it *inter alia* refers to the "Parties" which "have agreed as follows". It also uses "shall" throughout and provides that the parties "agree to" cooperate in a specific manner. It furthermore contains provisions on entry into force and termination and the possible suspension in case of a persistent failure to comply. The actual text of the WA suggests that the EASA has entered into binding commitments under international law, since the WA cannot in any event be qualified as a contract (like the EMSA SLA), something which falls outside its mandate. The EASA is one of the agencies (like the EMSA) which has not concluded a WA with its partner DG. As a result, there is no document that explicitly excludes an international legal personality of the agency. At the same time, the current EASA regulation

136. See Art. 2 of Regulation 768/2006; Annex II, Subpart Ops, Section II, ARO.RAMP.150(a)(2) of Regulation 965/2012.

137. The EU and Ukraine have not concluded a Common Aviation Area agreement yet, although they are working towards one. See e.g. EEAS, EU launches new aviation safety project in Ukraine, Press Release 190315_6.

138. In *France v. Commission II* the Court noted that "both the Transatlantic Economic Partnership and the Action Plan were approved by the Council, as is made clear in the memorandum of 9 April 2002 sent by the Commission to the committee set up pursuant to Article 133(3) EC, and the committee was regularly informed of the progress of the negotiations relating to the drafting of the Guidelines by the Commission's services." See Case C-233/02, *France v. Commission II*, para 41.

139. Coman-Kund, following an extensive analysis, also concludes that the EASA's SAFA WAs "feature legally binding provisions". See Coman-Kund, op. cit. *supra* note 12, p. 239.

provides that EASA WAs cannot bind the EU or its Member States.¹⁴⁰ It would thus appear that it is the EASA that has committed itself. Under the 2008 EASA Regulation (which was applicable at the time of the conclusion of the WA) one could argue that the WA could still be imputed to the Commission,¹⁴¹ since it had given its prior approval to the WA, but the current Regulation has changed this into a mere prior consultation. While the latter requirement would still conform to the *Short-selling* requirements, it is clearly insufficient to safeguard the prerogatives of the institutions proper under the institutional balance if Ukraine were to hold the EU internationally responsible for the binding SAFA. Especially under the new 2018 EASA Regulation, then, EASA working arrangements that actually appear to be agreements, such as the one with its Ukrainian counterpart, will become legally problematic.¹⁴²

5.3. *EMSA's Cooperation Agreement with Eurocontrol*

The EMSA relies on Remotely Piloted Aircraft Systems (RPAS) to perform surveillance functions under its mandate. To ensure safe use, the airspace used by RPAS is segregated from the airspace used by other users, at the cost of flexibility for all airspace users. Projects have therefore been set up to allow RPAS to fly in non-segregated airspace. To this end, EMSA (as an RPAS user) entered into an agreement with the Air Traffic Manager, Eurocontrol. The agreement establishes a (modest) “framework for cooperation to facilitate EMSA’s RPAS into non-segregated airspace and to draw general lessons from this experience”. The language used in the agreement suggests an intention to be bound: it includes terms such as “the Parties”, “have agreed as follows”; the Parties “will” or “shall”. There is also a separate clause on dispute settlement (including an obligation to resort to arbitration) and specific clauses on duration (indefinite) and termination.

Unlike EMSA’s SLA discussed in section 5.1, the cooperation agreement does refer to Article 15(2)(ba) of the EMSA Regulation which allows the Director to conclude “administrative arrangements” with “other bodies

140. It should be noted that the 2008 Regulation did not provide that the EASA could not bind the EU or the Member States, but the non-binding Common Approach of 2012 provided so in a general manner for all EU agencies (cf. *supra*).

141. This would then of course raise the question whether the Commission had violated the Council’s prerogatives under Art. 218 TFEU, in light of *France v. Commission II* (cf. *supra*), or whether instead, by adopting Directive 2004/36, the Council had legitimately conferred this power on the Commission.

142. Indeed, under the 2008 EASA Regulation, Coman-Kund concluded, largely because of the Commission’s power of approval, that EASA could not be considered to be “an independent entity on the international plane”. See Coman-Kund, *op. cit. supra* note 12, p. 245.

working in the Agency's fields of activities". The regulation thereby prescribes that such arrangements need to be submitted to the Board which may object within four weeks. Given that there is no WA between the EMSA and the Commission, the agreement cannot be assessed in this light. In any event, the *binding* cooperation agreement appears legally problematic, since it is not a *non-binding* arrangement (as foreseen in the EMSA Regulation). If it is to be deduced from the other WAs (between the Commission and the other agencies) that the EMSA also lacks international legal personality, its conclusion of a cooperation agreement definitely appears legally questionable. In terms of delegation, the agreement does seem a suitable and even necessary measure for the EMSA to realize its mission and tasks as pre-defined in the EMSA regulation. The Commission's presence on the EMSA Board further ensures that the agency cannot act fully autonomously. Whether the institutional balance *sensu stricto* is affected is unclear. One could argue that since EMSA respects the requirements of *France v. Commission II*¹⁴³ and as long as it respects the Common Approach and is not seen as acting on behalf of the EU, the prerogatives of the institutions remain intact. Yet this thus depends on how the agreement is perceived by EMSA's counterparts and whether they would hold the EU responsible, under international law, for any breaches of the agreement. As far as the Commission is concerned, the fact that it holds only four votes on the Management Board means that it cannot force the Board to object to a proposed administrative arrangement under Article 15(2)(ba) of the EMSA Regulation unless one takes the view that the early warning mechanism gives sufficient control to the Commission over the Board's dealings.¹⁴⁴

5.4. *EFSA's Memorandum of Cooperation with the Food Safety Commission of Japan*

The EFSA first concluded a Memorandum of Cooperation with its Japanese counterpart (FSCJ) in 2009. In 2015 this memorandum was renewed and elaborated. It provides that its purpose is to "enhance the scientific cooperation and dialogue between EFSA and FSCJ" and emphasizes both that it "does not imply any legal obligations" and "does not intend to compromise EFSA's and FSCJ's ability to carry out their respective responsibilities neither does it intend to create any legal rights or obligations". Concretely the Memorandum foresees in mutual support on issues such as information exchange, sharing of expertise, capacity building, training and visits. This is

143. See *supra* note 138.

144. See para 59 of the Common Approach. Under the mechanism, the Management Board is under no formal obligation to act upon the Commission's reservations.

done in respect of the existing (internal) legislative frameworks applicable to both the EFSA and FSCJ, meaning that the memorandum itself does not create a legal basis for information exchange for example. The language used (“the organizations” rather than “the parties”, “intend to”, “may”) further points to the soft law character of the memorandum.

In terms of form and substance, then, the memorandum complies with the positive law framework identified above. In this regard it may be noted that unlike the EMSA and EASA, the EFSA does have a WA with its partner DG. The purpose and content of the memorandum with the FSCJ appear in line with that WA.¹⁴⁵ Since the EFSA has not impinged on one of the institutions’ prerogatives by concluding the memorandum and the (limited) cooperation set up with the FSCJ appears suitable for the EFSA to achieve its missions, no legal objections can be formulated against this type of administrative working arrangements.

5.5. Agencies’ administrative agreements, an assessment

The possibility for EU agencies to liaise with international counterparts immediately raises the problematic position of “administrative agreements” in international law. In sections 3 and 4 it was already established that EU agencies cannot in any event commit the EU, and that EU agencies seem to lack an international legal personality of their own to commit themselves under international law. Four working arrangements were looked at, to determine: (i) whether in adopting these arrangements the agency in question respected both the constitutional and the positive law frameworks identified in sections 3 and 4; and (ii) whether the actual working arrangements may shed a different light on the question of the agencies’ international legal personality. After all, if arrangements concluded by EU agencies are found to be binding, they may indicate a recognition on the side of the EU’s partners that the EU agency enjoys international legal personality.

On this first point, the key issue was to distinguish those texts in which the authors commit themselves (binding, agreements) from those in which they simply declare their intentions (non-binding, arrangements). For this, the language relied on is indicative.¹⁴⁶ Indeed, under international law the nature (legal or political) of such a text depends on “its actual terms and [on] the particular circumstances in which it was drawn up”.¹⁴⁷ Applying this to the

145. See European Commission, Guidance note for EFSA’s international activity (on file with the author).

146. Virally, *op. cit. supra* note 24, pp. 227–228.

147. ICJ, Aegean Sea Continental Shelf Case, *Greece v. Turkey*, Judgment of 19 Dec. 1978, para 96.

selected cases, it was revealing to find that only the EFSA's memorandum was an actual arrangement, the other texts showing the parties' intention to be bound. Leaving aside EMSA's SLA, which should be qualified as a commercial contract, this means that the agreements concluded by EMSA and EASA may be problematic if the reference to "arrangements" in their establishing acts is to be read as allowing only for non-binding agreements. Given that these two agencies do not have a WA with their partner DG – in itself quite remarkable since it is precisely these agencies that have been prolific in their external dealings,¹⁴⁸ there are no WAs in the light of which those establishing acts may be read. Do these "agreements" concluded by the EMSA and EASA amount to a practice that indicates a recognition of their international legal personality? This is difficult to argue for the EASA since its SAFA WA is not concluded with the Ukrainian State itself; but EMSA did conclude an agreement with Eurocontrol – an international organization with legal personality. Of course, the practice of the actual implementation of these "agreements" will shed further light on this question, but that falls outside the scope of this contribution.

Yet, even if the notion of arrangements is to be read in its generic meaning, rather than in line with the Commission's post-Lisbon practice,¹⁴⁹ with the result that both agreements are not problematic under the positive law framework, legal issues remain under the constitutional framework identified in section 3. After all, the positive law framework does not fully and properly reflect the constitutional framework. This is especially clear when the EMSA's agreement with Eurocontrol is compared to the EASA's SAFA with its Ukrainian counterpart. While both could be said to respect the non-delegation doctrine flowing from *Short-selling*, apart from the fact that only arrangements are explicitly foreseen in the establishing acts, the fact that the Commission had to agree to the SAFA arguably gave sufficient means to that institution to safeguard its prerogatives. For EMSA's agreement, however, the procedure prescribed in the establishing regulation only grants a comparable power to the Management Board. Similarly, any new SAFAs which EASA would conclude no longer require Commission approval, raising the problem of a violation of the Commission's prerogatives if EASA is seen to act on behalf of the EU.

148. As noted above, the EFSA Memorandum is legally unproblematic, while EFSA has a WA with its partner DG. Similarly, the EFCA has the strictest WA with its partner DG, but has not even concluded any WA with external actors (as confirmed by the agency in an email dated 7 May 2019, on file with the author). The WA for the EFCA is arguably the strictest because it is the only one that refers to Art. 17 TEU, noting that "without a specific mandate given by the Commission, EU agencies are not entitled to exert any external activity".

149. Cf. *supra* note 19.

6. Conclusion

As with most governance issues in EU agencification, the EU legislature has not developed a uniform approach towards the possibility for the EU agencies to conclude working arrangements with third country and international counterparts. The Common Approach on Decentralized Agencies sets out a number of principles, but it is a non-binding IIA which has not been duly implemented by the EU legislature. Specifically for the EU agencies' external relations, the deficiency in the implementation of the Common Approach is clear in the lack of WAs concluded between agencies such as Frontex, EASA and EMSA and their partner DGs, despite the first two of these agencies probably being the most prolific of all in pursuing external relations.

An analysis of the positive law framework governing the EU agencies' external relations (composed of the relevant establishing acts, the Common Approach and any applicable WAs with partner DGs) reveals that it only partially and in a fragmented manner reflects the constitutional principles which ought to govern the agencies' external action. The present article further shows how these constitutional principles can be narrowed down to the principle of institutional balance (construed broadly) and the *Meroni* doctrine as re-interpreted in *Short-selling*.

Under the constitutional framework thus identified, agencies may develop external relations as long as this is explicitly allowed under their establishing regulations (or other legislation) and as long as they respect the (negative) obligation not to infringe on the prerogatives of the institutions proper and the (positive) obligation to allow those institutions to exercise these prerogatives. If those conditions are met, the agencies may be empowered to act on the external plane insofar as necessary to fulfil their internal mandate and insofar as the EU legislature (or the Commission) sets out the criteria governing this external action in advance. The agency may then only implement this external action following approval of or in consultation with other actors, such as for example the Council or Commission.

If these conditions are met, it would in principle be possible for the EU agencies to conclude binding international agreements either on their own behalf or on behalf of the EU. However, the EU institutions have pre-empted the latter possibility in the Common Approach by making clear that agencies can never represent or bind the EU. Of the WAs in place between partner DGs and their agencies, most also rule out the possibility for an agency to acquire international legal personality, meaning that those agencies cannot commit themselves under international law either.

The resulting legal situation is unsatisfactory: the applicable positive law framework is fragmented since it is a mosaic to be reconstructed from

different texts. This fragmentation then results in differentiation since different texts apply to different agencies. The framework is furthermore also crippled because some of these texts are non-binding (Common Approach, agency-partner DG working arrangements) and it is incomplete because it does not properly reflect the constitutional framework as identified in section 3 above. This is politically and legally problematic since it results in ambiguity, which facilitates "agency loss". Without a proper framework, it is difficult to hold either EU agencies or the EU institutions to account for the external action of the EU agencies.

Applying both the constitutional and the positive law frameworks to some of the texts concluded by EU agencies with international counterparts, reveals that some are in fact unproblematic because they are non-binding cooperation instruments or because they are binding but merely amount to a commercial contract. A third case identified revealed the existence of WAs which pose greater legal problems. Despite being qualified as an arrangement, the SAFA WA which EASA concluded with its Ukrainian counterpart appears to be a binding agreement, the legal basis of which is lacking. "Agreements" like the SAFA WA might indicate a practice of the EASA concluding international agreements. Whereas the legal fiction of imputing such an agreement to the Commission (and from the Commission to the EU) could be applied under the 2008 EASA Regulation, this appears impossible under the 2018 EASA Regulation.

While no appetite exists among the institutions, apart from the European Parliament, to revisit the Common Approach, this study on the EU decentralized agencies' external relations reveals how a binding IIA on decentralized agencies' governance has become acutely necessary. The current fragmented *ad hoc* approach appears detrimental to legal certainty and, because there is still no clear consensus on the role and place of EU agencies in the EU's institutional set-up, no elegant (i.e. a sufficient but not burdensome) control regime is in place for agencies. As a minimum then, EU agencies themselves should be more careful and avoid concluding agreements where they are only empowered under their mandate to conclude arrangements.

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